Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

BROOKSHIRE BROTHERS HOLDING, INC. ET AL,
PETITIONERS

v.

DAYCO PRODUCTS, INC. ET AL, RESPONDENTS

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the district court's order remanding the case to state court following its discretionary decision to decline to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c) is barred from appellate review by 28 U.S.C. § 1447(d).

2. Whether the district court's order remanding the case to state court based on its analysis of the discretionary factors identified in 28 U.S.C. § 1367(c) is barred from appellate review by 28 U.S.C. § 1452(b), where the case had been removed to federal court solely under 28 U.S.C. §§ 1334 and 1452(a) on the ground that it related to a bankruptcy proceeding under Chapter 11.

LIST OF PARTIES

The following were parties to the proceedings in the court of appeals:

Plaintiff - Appellees:

Brookshire Brothers Holding, Inc.

Brookshire Brothers Management, Inc.

Brookshire Brothers Ltd.

Defendant - Appellants:

Dayco Products Inc.

Shell Chemical LP

Ticona Polymers Inc.

Mark IV Industries LTD

Underwriters Laboratories Inc.

RULE 29.6 STATEMENT

Petitioners are Brookshire Brothers Holding, Inc., Brookshire Brothers Management, Inc., and Brookshire Brothers Ltd. No publicly held corporation owns more than 10 percent of any of the petitioners' stock.

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PETITION FOR A WRIT OF CERTIORARI

Brookshire Brothers Holding, Inc., Brookshire Brothers Management, Inc., and Brookshire Brothers Ltd. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 554 F.3d 595. The remand order of the district court (App., *infra*, 15a-17a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 2009. A petition for rehearing was denied on February 9, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of 28 U.S.C. §§ 1334, 1367, 1447, and 1452 are set forth in the Appendix. App., *infra*, 20a-22a.

STATEMENT OF THE CASE

This case presents two questions related to the court of appeals' lack of subject matter jurisdiction. The first is the same question presented in *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, No. 07-1437 (argued Feb. 24, 2008). Based on that question, the Court should hold the petition pending the decision in *Carlsbad Technologies* and then grant the petition, vacate the decision below, and remand the case to the court of appeals for further proceedings following its deci-

sion. Such a remand is particularly appropriate given the court of appeals' record of review of discretionary decisions regarding whether to exercise supplemental jurisdiction.

The second question presented relates to an independent jurisdictional defect based on 28 U.S.C. § 1452(b)'s prohibition of appellate review of decisions regarding whether to remand claims to State court "on any equitable ground" in bankruptcy-related cases. While that distinct limitation on appellate review was not raised in the court of appeals, §1452(b) was raised as a basis for remand in the district court, and by its terms it clearly applies in this case. Because the court of appeals' lack of jurisdiction under § 1452(b) is clear, the Court should vacate the decision below and remand with instructions to dismiss the appeal. In the alternative, the Court should grant the petition and either resolve the § 1452(b) question, or vacate the decision below and remand the case to the court of appeals to consider the § 1452(b) jurisdictional defect in the first instance, along with the Court's decision in *Carlsbad Technologies*.

A. Factual Background

This is a products liability suit in which the petitioner companies (collectively, "Brookshire Brothers") allege that they sustained damage due to leakage from defective pipes installed at their gas stations in Texas and Louisiana to connect underground storage tanks to gas pumps. Brookshire Brothers brought suit in Louisiana state court against the manufacturer of the pipes (Total Containment, Inc. or "TCI"), its insurers, manufacturers of component parts, and providers of raw materials.

Some six months later, TCI filed for bankruptcy. TCI's primary insurer then removed the case to the United States District Court for the Western District of Louisiana on the ground that it "related to" TCI's bankruptcy. Under 28 U.S.C. § 1452(a), a party may remove any case to a district court that has jurisdiction under 28 U.S.C. § 1334, which confers on district courts "original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to a case under title 11." The relation to the manufacturer's bankruptcy was the sole basis for the removal. App., *infra*, 2a.

Brookshire Brothers eventually settled with TCI and TCI's primary insurer. The district court also granted motions for summary judgment dismissing the majority of the remaining TCI insurers, while Brookshire Brothers dismissed the remaining few whose policies provided no coverage. Brookshire Brothers then moved to remand the case to state court, arguing that the claims against the remaining defendants no longer meaningfully related to any bankruptcy proceeding. The motion expressly relied on two independent grounds for remand.

The first ground was 28 U.S.C. § 1447(c), which in all cases removed from State court requires a remand "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction." The next subsection, 28 U.S.C. § 1447(d), provides that, except for certain civil rights cases, "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." Brookshire Brothers argued that the post-removal dismissal of all claims against TCI and its insurers made it impossible for the suit to have any effect on the bankruptcy estate of TCI. It con-

tended that, because the remaining claims no longer related to any bankruptcy proceeding, the district court lost its "related to" jurisdiction. Since its "related to" jurisdiction was the sole basis for the removal (*i.e.*, all of the claims in the case have always been based solely on State law), the loss of "related to" jurisdiction left the court with no subject matter jurisdiction, and it was required to remand the case under § 1447(c). Mem. in Support of Mot. to Remand at 3-6.

The second ground for the remand motion was 28 U.S.C. § 1452(b), which, apart from the general remand authority of § 1447(c), authorizes district courts to remand any claim or cause of action over which it has jurisdiction under 28 U.S.C. § 1334 (*i.e.*, claims related to bankruptcy proceedings) "on any equitable ground." Section 1452(b) further provides that such a bankruptcy-related remand order "is not reviewable by appeal or otherwise." Brookshire Brothers contended that remand was appropriate under § 1452(b) based on discretionary factors that had been identified by the district court in *Landry v. Exxon Pipeline Co.*, 260 B.R. 769, 801-802 (M.D. La. 2001). Those factors include the suit's degree of relatedness to and likely effect on the bankruptcy proceedings. Mem. in Support of Mot. to Remand at 7. They also include factors similar to those identified in 28 U.S.C. § 1367(c) for declining supplemental jurisdiction, such as "the extent to which state law issues predominate over bankruptcy issues"; "the difficulty or unsettled nature of the applicable state law"; "the jurisdictional basis, if any, other than 28 U.S.C. § 1334"; and "the presence of a related proceeding commenced in state court." Mem. in Support of Mot. to Remand at 7.

Respondents resisted the motion and urged the district court to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c). *See* Joint Mem. in Opp. to Mot. to Remand at 3-6.

B. Decisions Below

On November 27, 2007, the district court granted Brookshire Brothers' motion to remand. App., *infra*, 16a-17a. While the court noted at the outset of the order that "Brookshire Brothers maintains that an event post-removal can destroy subject matter jurisdiction and require remand under 28 U.S.C. § 1447(c)," the court's analysis focused exclusively on the factors identified in § 1367(c) governing the exercise of supplemental jurisdiction. *Id.* The court concluded that "each factor militates in favor of remand." *Id.* "There is no doubt," the court explained, "that this products liability case involves complex issues of State law, nor is there any doubt that the only reason this case was removed to federal court was because it was related to a bankruptcy proceeding which is no longer relevant to the instant case." *Id.* It further found "that the suit . . . contains only issues of State law, and in the interest of comity, these State law issues would be more properly decided by a State forum." *Id.* Based on those reasons, the court "ORDERED that the motion and order to remand is hereby GRANTED," and that "[t]he cause is remanded to the 14th Judicial District Court for the Parish of Calcasieu, State of Louisiana." *Id.*

Respondents appealed, and the court of appeals reversed. App., *infra*, 1a-14a). The court of appeals first held that it had jurisdiction over the appeal. The court concluded that 28 U.S.C. § 1447(d), barring appeal of remand orders, applies only to remands for lack of subject matter jurisdiction or for a

defect in the removal procedure. It held that a remand based on declining supplemental jurisdiction is neither. *Id.* at 8a-9a. The court declined to follow the Federal Circuit's contrary decision in *HIF Bio, Inc. v. Yung Shin Pharm. Indus. Co.*, 508 F.3d 659 (Fed. Cir. 2007), *cert. granted* October 14, 2008 (No. 07-1437). *Id.* at 7a-8a.

No party raised 28 U.S.C. § 1452(b)'s independent prohibition of appellate review for remands in bankruptcy-related cases before the court of appeals, and the court's decision does not address it. Instead, the parties and the court focused solely on the applicability of § 1447(d) and the question whether a discretionary remand under § 1367(c) constitutes a remand for lack of subject matter jurisdiction under § 1447(c). From the arguments made below, however, it was both clear and undisputed that (1) the case was removed to federal court under §§ 1334, 1446, and 1452 *solely* because of its purported relation to the bankruptcy proceeding of TCI, and (2) the district court ordered remand, in part, because it found that the bankruptcy proceedings were "no longer relevant" to the case and that "in the interest of comity," the sole remaining State law issues "would be more properly decided by a State forum." Mot. to Dismiss Appeal at 2, 5; Appellee's Br. at 4-7.

After concluding that it had jurisdiction, the court of appeals held that the district court had abused its discretion in ordering remand. App., *infra*, 14a. The principal ground for the court's conclusion was that the case had been in litigation for four years and extensive discovery had taken place. *Id.* at 13a. The court expressed little regard for the district court's finding that "[t]here was no doubt that this products liability case involves complex issues of State law,"

stating that in its view "the remaining state-law issues . . . do not appear to be particularly novel or complex." *Id.* The court also expressed concern that Brookshire Brothers would "attempt to re-litigate in state court rulings made against it by the district court." *Id.* at 13a-14a.[1]

REASONS FOR GRANTING THE WRIT

I. AT A MINIMUM, THE COURT SHOULD GRANT THE PETITION, VACATE THE DECISION BELOW, AND REMAND FOR FURTHER PROCEEDINGS FOLLOWING THIS COURT'S DECISION IN *CARLSBAD TECHNOLOGIES*

This case presents the same issue (Question 1) presented by a case currently before the Court. *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, No. 07-1437 (argued Feb. 24, 2008). Both this case and *Carlsbad Technology* present the question whether a district court's decision in a removed case to decline the exercise of supplemental jurisdiction under 28 U.S.C. § 1367(c), after subsequent events have undermined the basis for original jurisdiction, falls within the bar on appellate review under 28 U.S.C. § 1447(d). With one qualification (relating to 28 U.S.C. § 1452(b)'s independent bar on appellate review in bankruptcy-related cases, discussed at Part III, *infra*), this case likely will be controlled by this Court's decision in *Carlsbad Technologies*. Accordingly, the Court should hold this petition pending the Court's decision in *Carlsbad Technologies*, and then grant the

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[1] On January 23, 2009, the court of appeals granted respondent's request to enjoin all state court proceedings related to the case. 01/23/09 Order at 2.

petition, vacate the decision below, and remand the case for further proceedings in light of this Court's decision.

If the Court agrees with the respondent in *Carlsbad Technologies* and holds that § 1367(c) remands are subject to § 1447(d)'s bar on appellate review, then this Court should vacate the decision below, which reaches the opposite conclusion, and remand the case to allow dismissal of the appeal.

The same is true, even if the Court holds that § 1447(d) does not categorically bar appellate review of § 1367(c) remands. In issuing such a holding, the Court may provide guidance on the exercise of appellate jurisdiction in this context. As the Fifth Circuit's decisions in this and other cases demonstrate, the Court's guidance on that issue is surely needed.

Since the supplemental jurisdiction statute went into effect in 1990, the Fifth Circuit has heard numerous appeals of discretionary decisions on whether to exercise supplemental jurisdiction, with varying results and rationales. [2] In this case, for ex-

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[2] **District court's decision not to exercise supplemental jurisdiction was abuse of discretion**: *Batiste v. Island Research, Inc.* 179 F.3d 217 (5th Cir. 1999); *Newport Ltd. v. Sears, Roebuck and Co.*, 941 F.2d 302, 308 (5th Cir. 1991).

District court's decision to exercise supplemental jurisdiction was abuse of discretion: *Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 588 (5th Cir. 1992); *McClellan v. Gronwaldt*, 155 F.3d 507, 519-21 (5th Cir. 1998).

District court decision affirmed: *Mendoza v. Murphy*, 532 F.3d 342, 346 (5th Cir. 2008); *Guzzino v. Felterman*, 191 F.3d 588, 595 (5th Cir. 1999); *Robertson v. Neuromedical Ctr.*, 161 F.3d 292, 296 (5th Cir. 1998); *Metro Fuel Truck Sales v. Ford Motor Co.* 145 F.3d 320, 328 (5th Cir. 1998); *Doddy v. Oxy USA, Inc.*, 101 F.3d 448 (5th Cir. 1996); *Engstrom v. First Nat.*

ample, the court of appeals disregarded its prior decisions recognizing that discovery and other pretrial matters are readily transferable to State court and, therefore, the fact that they have occurred during the federal proceedings is generally not a ground for overturning an order declining to exercise supplemental jurisdiction.[3] It also showed little or no regard for the trial court's specific finding that several of the remaining State law issues were complex and novel and better resolved by the State court.

Bank of Eagle Lake, 47 F.3d 1459 (5th Cir. 1995); *Neal v. Sky Chefs*, 39 F.3d 321 (table); 1994 WL 612799 (5th Cir. 1994); *Tortuga Bay v. Arnold Dev.*, 20 F.3d 1070 (table) (5th Cir. 1994); *Adair v. Amerus Leasing*, 86 Fed. Appx. 736, 2004 WL 239184 (5th Cir. 1994).

[3] In the decision below, the court of appeals stressed that extensive discovery had already taken place in federal court and cited other decisions also referring to the parties' investment in federal court discovery as one reason not to remand. Slip op. 8-10. By contrast, in *Guzzino v. Felterman*, 191 F.3d 588, 595 (5th Cir. 1999), the court concluded that remand was justified even though "substantial pretrial activity was had following removal," because other reasons supported remand, much of the trial court's involvement related to failed claims, and "the parties' work product could be taken, with little loss, to the state litigation." In another case holding that the district court abused its discretion by retaining jurisdiction where some discovery had already occurred, the court of appeals observed that "the most expensive element of the trial preparation, discovery, was largely usable in the state proceeding." *Parker & Parsley Petroleum Ltd. v. Dresser Indus.*, 972 F.2d 580, 588 (5th Cir. 1992). The court relied on a previous decision reversing the district court's refusal to remand back to a Louisiana state court, where the court of appeals observed that "no trial has taken place" and "any discovery could be utilized in a state court proceeding." *Waste Systems Inc. v. Clean Land Air Water Corp.*, 683 F.2d 927, 931 (5th Cir. 1982).

Even if the Court holds that § 1447(d) does not categorically bar review of remand orders in this context, the scope of that review should be limited and deferential to carry out Congress's obvious goal of facilitating remands and avoiding time-consuming appeals on such matters. A remand following this Court's decision in *Carlsbad Technologies* will provide the court of appeals with an opportunity to align its approach to review in these cases with this Court's decision.

II. LANGUAGE ADDED TO §§ 1447(C) AND 1367 SINCE *THERMTRON* MAKES CLEAR § 1367(C) REMANDS ARE SUBJECT-MATTER JURISDICTION BASED

During the oral argument in *Carlsbad Technologies*, several Justices asked whether a federal court is able to divest itself of subject matter jurisdiction by its own discretionary acts. *See* 07-1437 Oral Arg. Tr. 35-38. Several Justices also inquired into whether there was a rational way to reconcile this Court's holding in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), that § 1447(d)'s ban on appeal of remand orders extends only to remands authorized by §1447(c), with a holding that § 1367(c) remands are barred by § 1447(d). *See* 07-1437 Oral Arg. Tr. 12-19. The answer to both questions is yes, as confirmed by language Congress added to §§ 1447(c) and 1367 *after* this Court's decision in *Thermtron*.

First, after this Court decided *Thermtron*, Congress enacted 28 U.S.C. § 1367, which defines the scope of federal court supplemental jurisdiction. The plain terms of § 1367(a) expressly limit Congress's grant of federal subject matter jurisdiction over supplemental claims to only those circumstances where

the federal court has determined it would be appropriate to exercise supplemental jurisdiction. Thus, it confers supplemental subject matter jurisdiction over all claims that are within the same case or controversy as a claim within the court's original jurisdiction, "*except* as provided in subsections (b) and (c)." 28 U.S.C. § 1367(a) (emphasis added).

The district court's decision to decline to exercise supplemental jurisdiction under § 1367(c) brings the case within § 1367(a)'s explicit exception to its grant of subject matter jurisdiction. By § 1367's express terms, the district court's decision did not leave subject matter jurisdiction in place (although unexercised); rather, *it removed the case from § 1367(a)'s grant of subject matter jurisdiction.* At that point, the court "lack[ed] subject matter jurisdiction" and was required to remand the case under § 1447(c). Accordingly, this case and *Carlsbad Technologies* fall within the literal language of § 1447(c) and, under *Thermtron,* fall within the appeal bar of § 1447(d).

In other contexts, this reading could be challenged as in tension with the usual rule that subject matter jurisdiction is not discretionary but must be exercised if properly invoked. *See Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976), describing "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." However, there are exceptions to the usual rule, of which supplemental jurisdiction is a prominent example. Supplemental jurisdiction is clearly a form of subject matter jurisdiction. But just as clearly the district court does not have to exercise it. Like its predecessor, pendent jurisdiction, it is a "doctrine of discretion, not of plaintiff's right." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350

(1988), quoting *Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). In that context, the presence of discretionary elements does not make the district court's remand decision non-jurisdictional. Instead, the district court's decision is jurisdictional under the clear language of § 1367(a), which confers supplemental jurisdiction on the district court "except" if it declines to exercise jurisdiction under §1367(c).

Second, after *Thermtron*, Congress amended § 1447(c) twice, with the effect of extending statutory remand authority to situations where events subsequent to removal undermine the basis for federal jurisdiction.[4] These amendments extend the statutory remand authority to situations covered by § 1367's grant of authority to the district courts to consider whether the passage of time since removal has created equitable and other considerations counseling against remand. All this was done in light of "the established practice of denying review of orders remanding causes removed from state courts." *U.S. v. Rice*, 327 U.S. 742, 752 (1946). Congress "must be taken to have been aware of the universality of that practice." *Ibid.*, quoted in *Things Remembered v.*

[4] When *Thermtron* was decided, § 1447(c) authorized remand if "it appears that the case was removed improvidently and without jurisdiction." *Thermtron*, 423 U.S. at 342. In 1988, the statute was amended to require a motion to remand on the basis of any defect in removal procedure to be made within 30 days, and to provide that the case shall be remanded "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction." Pub.L. 100-72, Title X, § 1016(c), 102 Stat. 4670. In 1996, the statute was amended to provide that a motion to amend on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days. Pub.L. 104-219, § 1, 110 Stat. 3022.

Petrarca, 516 U.S. 124, 128 (1995). There is no evidence Congress wanted to lift the long-standing bar on appeals of remand orders simply because the events undermining federal jurisdiction took place after rather than before removal.

Moreover, supplemental jurisdiction is not the only situation where a decision to remand by the district court is not reviewable on appeal. *See* 28 U.S.C. §§ 1334(c)(1),(2), 1334(d), & 1452(b). Nor is it the only instance in which Congress has enacted jurisdictional provisions with discretionary elements. Section 1447(e) is another example. Under that provision, the district court has discretion whether to join additional parties and remand if they destroy jurisdiction, or to deny joinder and preserve jurisdiction. 28 U.S.C. § 1447(e).

The Class Action Fairness Act of 2005 ("CAFA") also contains a jurisdictional provision with discretionary elements. CAFA gives federal courts subject matter jurisdiction over certain class actions despite lack of complete diversity, except that in some cases the district court has discretion to decline to exercise jurisdiction based on certain broadly-worded criteria. 28 U.S.C. § 1332; *see Preston v. Tenet Healtsystem Mem'l Ctr.*, 485 F.3d 804, 810-12 (5th Cir. 2007).[5] CAFA also provides that § 1447 governs removal of class actions, except that, "notwithstanding section 1447(d)," an expedited appeal from an order granting

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[5] In certain circumstances, the district court may, "in the interests of justice and looking at the totality of the circumstances," decline to exercise jurisdiction based on several factors, including whether the claims involve "matters of national or interstate interest," and whether the forum has "a distinct nexus with the class members, the alleged harm, or the defendants." 28 U.S.C. § 1332(d)(3).

or denying a remand is allowed. 28 U.S.C. § 1453(c). Congress clearly thought that without a special exception, the discretionary remand of a CAFA case would be a remand for lack of subject matter jurisdiction, subject to § 1447(d)'s appeal bar.

In short, the district court's decision to decline to exercise supplemental jurisdiction, which necessarily occurred before the entry of final judgment, denied the district court of subject matter jurisdiction. All agree that at that time no other form of jurisdiction existed; indeed, inherent in the district court's application of § 1367(c) is a conclusion, unchallenged on appeal, that it lacked any other ground for federal court jurisdiction. And, for the reasons explained, § 1367(a)'s grant of supplemental subject matter jurisdiction no longer applied. Accordingly, at that time, the district court lacked all subject matter jurisdiction and was required to remand the case under § 1447(c). Appellate review is therefore barred by the plain terms of § 1447(d), and so holding would be entirely consistent with *Thermtron*'s reasoning.

III. THE COURT OF APPEALS INDEPENDENTLY LACKED JURISDICTION UNDER 28 U.S.C. § 1452(b)

As explained, 28 U.S.C. § 1452(b) authorizes district courts to remand bankruptcy-related cases "on any equitable ground," and provides that any such remand order "is not reviewable by appeal or otherwise." Here, the court of appeals recognized, and it is undisputed, that the sole basis for removal in this case was its purported relation to TCI's bankruptcy proceedings. *See* App., *infra*, 2a. The court of appeals also recognized, and it is undisputed, that at the time Brookshire Brothers moved to remand the case, the bankruptcy proceedings were no longer

relevant to any remaining claim—TCI and its insurers having been dismissed. *Id.* at 2-3. The court of appeals also understood that in ordering remand, the district court considered the lack of any meaningful connection to bankruptcy proceedings, the State-law basis for the claims, and interests of comity—all of which are "equitable ground[s]" for remanding the case. *See Id.* at 8a-9a & n.3. Thus, as a matter of law, the court of appeals lacked jurisdiction under § 1452.

First, it is clear as a matter of law that the § 1367(c) factors relied on by the district court in determining that a remand was appropriate constitute "equitable ground[s]" under § 1452(b). As Justice Ginsburg explained, those are "capacious words" that are not limited to the traditional distinctions between law and equity, but instead include all appropriate grounds. *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 132 (1995) (Ginsburg, J., concurring). In *Things Remembered*, a timeliness defect in the removal motion was, in Justice Ginsburg's view, within the broad language of § 1452(b). Decisions of the courts of appeals, in accordance with her reasoning, have held § 1452(b) applicable to remands based on a broad range of grounds, and on that basis have held the remand orders non-appealable. *See, e.g., In re Seven Fields Dev. Corp.*, 505 F.3d 237, 246-47 (3d Cir. 2007) (improper filing of notice of removal); *Allied Signal Recovery Trust v. Allied Signal, Inc.*, 298 F.3d 263 (3d Cir. 2002) (abstention based on discretionary factors of § 1334(c)(1)); *Hawking v. Ford Motor Credit Co.*, 210 F.3d 540, 544-45 (5th Cir. 2000) (remand of state law claim after federal court gave judgment in related claim of trustee seeking recovery of bankrupt's assets); *Cathedral of the Incarnation v. Garden City Co.*, 90 F.3d 28, 32

(2d Cir. 1996) (remand on ground that removed case was not a core bankruptcy proceeding and thus was subject to mandatory abstention). Moreover, even if remand orders under § 1452(b) based on legal considerations were not deemed "equitable," the type of discretionary balancing involved in the district court's consideration of § 1367(c) factors would still constitute quintessentially equitable grounds, covered by even a narrow reading of § 1452(b).

As the Seventh Circuit explained, in a case holding non-appealable a remand order based on the district court's conclusion that the case was not "related to" a bankruptcy, Congress had excellent reasons not to make remand orders in bankruptcy-related cases appealable. "Remand orders are effective immediately, so state courts may get back to work on the cases." *Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223, 1226 (7th Cir. 1991). But "[a]n appellate order a year or more later may render this effort wasted—and the prospect of this waste may induce state judges to sit tight, leaving the case in limbo." *Id.* "Such a specter might be acceptable if a substantial proportion of remands were erroneous, but remands on procedural and jurisdictional grounds are largely mechanical, and 'equitable' remands are discretionary so that appellate review would be deferential." *Id.* As a result, the court concluded, appeals of remands "may be designed to achieve little more than a self-help continuance." *Id.*

Second, because this case was removed solely as a "related to" case under 28 U.S.C. §§ 1334 and 1452(a), it is clear as a matter of law that the remand falls under § 1452(b), even though the district court failed to cite § 1452 or identify any particular source for its remand authority. Again, as Justice

Ginsburg explained in *Things Remembered*, "it 'make[s] little sense' to rest reviewability *vel non* on the tag the trial court elects to place on its ruling." *Things Remembered*, 516 U.S. at 134, quoting *Sykes v. Texas Air Corp.* 834 F.2d 488, 492 (5th Cir. 1987). The Fifth Circuit itself held in the *Sykes* decision relied upon by Justice Ginsburg that any other result makes reviewability turn on "what the district court *says* it is doing." 834 F.2d at 492. Under such an approach, "reviewability [would] turn[ ] on incantation, and the district court [would have] absolute discretion to permit or to deny review of its order." *Id.*[6] Accordingly, a remand on an equitable ground of a case removed under § 1452(a) is necessarily a § 1452(b) remand, regardless of whether—or how—the district court characterizes its remand order.

Moreover, the district court's application of § 1367 does not remove this case from the scope of § 1452(b). Section 1334 grants district court's original but not exclusive jurisdiction over "all civil proceedings . . . arising in or related to cases under title 11." 28 U.S.C. § 1334(b). Section 1452(a) permits a party to "remove any claim or cause of action . . . if [the] district court has jurisdiction of such claim or cause of action under section 1334." 28 U.S.C. § 1452(a). Section 1452(b) then provides that "[t]he court to which *such claim or cause of action is removed* may remand *such claim or cause of action* on any equitable ground." 28 U.S.C. § 1452(b) (emphases added). *All* of the claims in this case were within the district court's jurisdiction under § 1334 at the

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[6] The contrary decision of the Third Circuit in *Pacor, Inc. v. Higgins*, 743 F.2d 984, 990-93 (3d Cir. 1984), discussed by Justice Ginsburg in *Things Remembered*, is no longer followed in Third Circuit. *Allied Signal*, 298 F.3d at 268 n.6.

time of removal, because they were part of a "civil proceeding . . . related to" TCI's bankruptcy case. Because all of the claims were removed under § 1452(a), they were all subject to remand under § 1452(b), even though post-removal events eliminated the remaining claims' relationship to the bankruptcy proceedings. Under the plain meaning of the terms of § 1452, any claim removed under § 1452(a) may be remanded under § 1452(b) for "any equitable ground." That is precisely what happened here.[7]

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[7] Notwithstanding the plain meaning of § 1452, the Fifth Circuit in *Doddy v. Oxy, U.S.A.*, 101 F.3d 448, 455 n.3 (5th Cir. 1996), stated that, when post-removal events eliminate the "relatedness" of removed claims to the bankruptcy proceedings, a district court's "remand authority switches from that under § 1452 to that under § 1367." However, without citing *Doddy*, the Fifth Circuit later reached the opposite result in *Hawking v. Ford Motor Credit Co.*, 210 F.3d 540 (5th Cir. 2000), also involving a remand of state claims that lost their bankruptcy relatedness after removal because the claim against the bankrupt was dismissed Without citing *Doddy* (although the case was discussed in the briefs), the Fifth Circuit concluded that § 1452(b) "authorize[ed] th[e] remand" and "preclude[d] appellate review of such orders in bankruptcy cases." *Hawking*, 210 F.3d at 550. The court relied solely on *Sykes v. Texas Air Corp.*, 834 F.2d 488 (5th Cir. 1987), which held non-appealable a remand order based on the case's lack of bankruptcy relatedness *at the time of removal*. It is therefore not clear how the Fifth Circuit would view the § 1452(b) issue in this case.

Nonetheless, for the reasons described, the plain meaning of § 1452(b) confirms the lack of appellate jurisdiction, as does the reasoning of other courts of appeals. *See, e.g., Allied Signal*, 298 F.3d at 269 (holding that the remand of a bankruptcy-related case "based on state law concerns," while not "meeting the criteria for remand under § 1447(c) and for the non-reviewability provisions of § 1447(d)," nonetheless "falls under § 1452(b) . . . and is not reviewable"). That conclusion is also

For these reasons, the court of appeals plainly lacked jurisdiction under § 1452(b) to review the district court's remand order. However, while § 1452(b) was raised in the district court as an independent and sufficient basis for the remand, *see* Mem. in Support of Mot. to Remand at 6-11, it was not argued to the court of appeals as a basis for its lack of jurisdiction. Instead, the parties and the court focused on whether a discretionary remand under the supplemental jurisdiction statute constituted a subject matter-jurisdiction based remand under 28 U.S.C. § 1447(c), and the impact on that question of this Court's decision in *Powerex Corp. v. Reliant Energy Servs.*, 127 S. Ct. 2411, 2418-19 (2007).

The failure to raise the § 1452 jurisdictional defect below does not preclude this Court from granting review of that question and vacating the decision of the court of appeals for its clear lack of subject matter jurisdiction. *See, e.g., United States v. Storer Broad. Co.*, 351 U.S. 193, 197 (1956); *Glidden v. Zdanok*, 370 US 530 (1962); *City of Gainesville v. Brown-Crummer Invest. Co.*, 277 US 54, 59 (1928); *Mansfield v. Swan*, 111 US 379 (1884); *see generally*, Gressman, et al., *Supreme Court Practice* 468 (9th ed. 2007) ("Jurisdictional issues, of course, can always be considered, even sua sponte, whether or not raised below."). Doing so here, moreover, would further Congress's manifest intent in enacting § 1452(b)

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consistent with Justice Ginsburg's observation that "'Congress meant to enlarge, not to rein in, federal trial court removal/remand authority for claims related to bankruptcy cases'" and "wanted bankruptcy forum remands to be 'unreviewable.'" *Id.*, quoting *Things Remembered*, 516 U.S. at 132 (Ginsburg, J., concurring), quoting H.R. Rep. No. 95-595, p. 51 (1977), U.S. Code Cong. & Adm. News 1978, pp. 5787, 6013.

in the first place, which is to permit bankruptcy-related cases to proceed as quickly as possible in State court once a district court orders remand "on any equitable ground."

Accordingly, the Court should grant the petition, vacate the decision below, and remand the case with instructions to dismiss the appeal for lack of jurisdiction. In the alternative, the Court could grant review of the § 1452(b) question or remand the case to the court of appeals to consider its jurisdictional defect under § 1452(b) in the first instance, along with this Court's decision in *Carlsbad Technologies*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, the decision below should be vacated, and the case should be remanded to the court of appeals with instructions to dismiss the appeal for lack of jurisdiction. In the alternative, the case should be remanded for further proceedings in light of this Court's decision in *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, No. 07-1437 (argued Feb. 24, 2008), and to permit the court of appeals in the first instance to consider its jurisdictional defect under 28 U.S.C. § 1452(b).

Respectfully submitted,

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April 6, 2009

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Filed: January 6, 2009

No. 07-31154

BROOKSHIRE BROTHERS HOLDING, INC., et al.
Plaintiffs-Appellees

v.

DAYCO PRODUCTS, INC., et al.
Defendants-Appellants

Appeal from the United States District Court
for the Western District of Louisiana

Before HIGGINBOTHAM, BENAVIDES, and STEWART, Circuit Judges. FORTUNATO P. BENAVIDES, Circuit Judge:

The defendants-appellants appeal the district court's remand of this case to Louisiana state court. The plaintiffs–appellees assert that this Court lacks jurisdiction to hear this appeal. We find that we possess jurisdiction over this appeal, REVERSE the ruling of the district court, and REMAND the case for further proceedings.

I. Background

This suit stems from the allegedly defective manufacture of flexible thermoplastic pipe ("flexpipe") used to connect underground storage tanks to above-ground dispensers at retail gas stations. Brookshire Brothers Holding, Inc., Brookshire Brothers Management, Inc., and Brookshire Brothers Ltd. (together, "Brookshire") brought this suit on August 15, 2003 against the manufacturer of the flexpipe systems and its insurers and the manufacturers of component parts and providers of raw materials used in the flexpipe systems (together, the "flexpipe defendants"), seeking damages stemming from the installation of flexpipe in sixty-five gas stations in Texas and three gas stations in Louisiana that are owned and operated by Brookshire.

On March 3, 2004, Total Containment, Inc. ("TCI"), the manufacturer of the flexpipe systems, filed for Chapter 11 bankruptcy, and on May 26, 2004, Commerce & Industry Insurance Co. ("C&I"), TCI's primary liability insurer, removed the instant suit to the U.S. District Court for the Western District of Louisiana on the basis that it "related to" the bankruptcy of TCI. Brookshire concedes that the case was properly removed and that the district court had jurisdiction over the suit at the time of removal.

The litigation in federal court lasted more than three years, generating more than 1,300 entries in the district court docket. The district court decided forty-one dispositive motions, fourteen *Daubert* motions, and seven other motions *in limine*. Discovery had closed and the parties were making final preparations for trial. Trial was originally set for October

17, 2005, but was continued four times. The most recent trial setting was February 11, 2008.

On July 17, 2007, Brookshire, TCI, and C&I filed a joint stipulation of dismissal, dismissing Brookshire's claims against TCI and C&I due to a settlement agreement, and on November 2, 2007, Brookshire moved to remand this suit to Louisiana state court. On November 27, 2007, the court granted Brookshire's motion to remand.

Brookshire argues that 28 U.S.C. § 1447(d) deprives this Court of jurisdiction to hear this appeal because the district court's order remanding this suit to Louisiana state court can be colorably characterized as being based on lack of subject matter jurisdiction under 28 U.S.C. § 1447(c). Alternatively, Brookshire argues that even if the order of remand was based on the district court's refusal to retain supplemental jurisdiction under 28 U.S.C. § 1367(c), appellate review is still barred by 28 U.S.C. § 1447(d). In the event that this Court finds that it does possess jurisdiction over this appeal, Brookshire asserts that the district court's refusal to exercise pendant jurisdiction was not an abuse of discretion. The remaining flexpipe defendants assert that this circuit's precedent is clear that this Court possesses jurisdiction over this appeal and that the district court abused its discretion in declining to exercise supplemental jurisdiction.

II. Jurisdiction To Review The Order Of Remand

Section 1447(d) states that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, " 28 U.S.C. § 1447(d), but the Supreme Court has held

that this prohibition applies only when an order of remand is based on one of the grounds specified in section 1447(c): lack of subject matter jurisdiction or a defect in removal procedure, *see Schexnayder v. Entergy La., Inc.*, 394 F.3d 280, 283 (5th Cir. 2004) (citing *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711–12 (1996)). This Court has held that a clear and affirmative use of Section 1367(c) discretion to remand and not exercise supplemental jurisdiction does not involve either of the grounds specified in section 1447(c), and therefore is reviewable on appeal for an abuse of discretion. *Regan v. Starcraft Marine, LLC*, 524 F.3d 627, 631 (5th Cir. 2008) (citing *Thomas v. LTV Corp.*, 39 F.3d 611, 616 (5th Cir. 1994)).[1] Most of our sister circuits have similarly found that a remand order based on declining supplemental jurisdiction is not within the class of remands described in section 1447(c) and is thus not subject to the jurisdictional bar of section 1447(d). *See, e.g., Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217, 223–24 (3d Cir. 1995) (citing precedents in the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits). In support of that proposition, this and other circuits have cited the Supreme Court's statement in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 355 n.11 (1988), that "[Section] 1447(c) . . . do[es] not apply to cases over which a federal court has pendent jurisdiction. Thus, the remand authority conferred by the removal stat-

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[1] *See also Giles v. NYLCare Health Plans, Inc.*, 172 F.3d 332, 339 (5th Cir. 1999) ("We review a discretionary remand of supplemental state law claims for abuse of discretion."); *Hook v. Morrison Milling Co.*, 38 F.3d 776, 780 (5th Cir. 1994) ("[I]f the court provides a reason unrelated to § 1447(c), such as pendent jurisdiction, then we may properly review that order.").

ute and the remand authority conferred by the doctrine of pendent jurisdiction overlap not at all." *See Hook v. Morrison Milling Co.*, 38 F.3d 776, 780 (5th Cir. 1994) (citing *Cohill*, 484 U.S. at 355 n.11); *McCandless*, 50 F.3d at 223–24 (same).

The Supreme Court recently cast some doubt on the proposition that a remand order based on declining supplemental jurisdiction under section 1367(c) does not fall within the class of remands described in section 1447(c), stating in *Powerex Corp. v. Reliant Energy Services*, 127 S. Ct. 2411 (2007), that "[i]t is far from clear . . . that when discretionary supplemental jurisdiction is declined the remand is not based on lack of subject-matter jurisdiction for purposes of § 1447(c) and § 1447(d)," and that the Court had "never passed on whether [such] remands are subject-matter jurisdictional for purposes of post-1988 versions of § 1447(c) and § 1447(d)." *Id.* at 2418–19 & n.4 (citations omitted); *see also Regan*, 524 F.3d at 631 (noting the Supreme Court's recent comments but declining to address the issue). Brookshire points out that one circuit that had not addressed the issue prior to *Powerex* has cited that decision in support of the proposition that remand orders based on declining supplemental jurisdiction under section 1367(c) fall within the class of remands described in section 1447(c), specifically remands for lack of subject matter jurisdiction. In *HIF Bio, Inc. v. Yung Shin Pharmaceuticals Industrial Co.*, 508 F.3d 659 (Fed Cir. 2007), the Federal Circuit found that "[b]y . . . undercutting the persuasive force of the decisions of the other Courts of Appeals relying on *Cohill*, *Powerex* appears to reopen the question of whether § 1367(c) remands are barred from review under §§ 1447(c) and (d)." *Id.* at 666. The court went on to hold that "because every

§ 1367(c) remand necessarily involves a predicate finding that the claims at issue lack an independent basis of subject matter jurisdiction, a remand based on declining supplemental jurisdiction can be colorably characterized as a remand based on lack of subject matter jurisdiction. Accordingly, a remand based on declining supplemental jurisdiction must be considered within the class of remands described in § 1447(c) and thus barred from appellate review by § 1447(d)." *Id.* at 667.[2]

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[2] The Third Circuit has succinctly explained why remands authorized by section 1367(c) and section 1447(c) are treated differently for the purposes of appellate review:

> Although the sharp distinction between remands authorized by § 1367(c) and remands authorized by § 1447(c) is often misunderstood, the reason behind their different treatment is clear. Review of § 1447(c) remands is barred to keep parties to state actions from making dubious allegations of federal jurisdiction in order to forestall the prompt resolution of state cases. Thus, § 1447(c) remands are warranted only when a federal court has no rightful authority to adjudicate a state case that has been removed from state court. In such cases, the statute provides a quick, permanent, and mandatory remedy to return a state case to state court.
>
> In contrast, § 1367(c) serves no such corrective purpose. Remands authorized by § 1367(c) may be entered only when federal subject matter jurisdiction has been affirmatively established, via 28 U.S.C. § 1367(a), and are entered independently of whether the case originated in state or federal court. Thus, a district court's decision to remand pursuant to § 1367(c) does not imply that the case was improperly filed in federal court. Rather, it reflects the court's judgment, reviewable on appeal for abuse of discretion, that at the present stage of litigation it would be best for supplemental jurisdiction to be declined so that state issues may be adjudicated by a state court. In such circumstances, there is no pressing need to

Although the Supreme Court has indicated that it considers it an open question whether a discretionary remand under section 1367(c) is based on a lack of subject matter jurisdiction, and is thus unappealable under section 1447(d), it is not an open question in this circuit. *Powerex* made clear that *Cohill* did not, as some courts seem to have found, settle the question, but it does not overrule or directly undermine the line of cases in this circuit holding that discretionary remands pursuant to section 1367(c) are appealable. *See Cal. Dept. of Water Res. v. Powerex Corp.*, 533 F.3d 1087, 1091–92 (9th Cir. 2008) (discussing *HIF Bio* and stating that "[t]he Federal Circuit's disagreement does not give a three-judge panel in this circuit license to overrule the binding, authoritative decision of a prior three-judge panel," and that "[s]imilarly, that the question remains unanswered by the Supreme Court does not relax our obligation to abide by *stare decisis*"). The Supreme Court in *Powerex* simply confirmed the rule in this circuit that "when a district court remands a properly removed case because it nonetheless lacks subject-matter jurisdiction, the remand is covered by § 1447(c) and thus shielded from review by § 1447(d)," 127 S. Ct. at 2417, and held that a reviewing court should find that an order of remand was based on lack of subject matter jurisdiction if the district court "colorably characterized" it as such, a

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block the mechanisms of review that are generally afforded civil litigants.

Thus, the bar to review codified at § 1447(d) is entirely inapplicable when the basis of the remand was the district court's discretion pursuant to § 1367(c). *Hudson United Bank v. LiTenda Mortg. Corp.*, 142 F.3d 151, 157–58 (3d Cir. 1998) (citations omitted).

standard that is consistent with this Court's rule that a district court must clearly and affirmatively invoke non-section 1447(c) grounds in order to avoid the bar imposed by section 1447(d), *id.* at 2418; *see also Smith v. Tex. Children's Hosp.*, 172 F.3d 923, 926 (5th Cir. 1999) (citation and quotations omitted) ("[W]e will only review remand orders if the district court affirmatively states a non-1447(c) ground for remand.").

In this case, the district court's order of remand was clearly based on 28 U.S.C. § 1367(c). The district court summarized Brookshire's argument that remand was required under 28 U.S.C. § 1447(c) in the first paragraph of the order, but the court then went on to analyze the remand issue under the discretionary standard set out in 28 U.S.C. § 1367(c), finding that "[w]hile it is certainly within our discretion to retain this case for further proceedings, after examining the factors enumerated in § 1367(c), the Court finds that the suit before us contains only issues of State law, and in the interest of comity, these State law issues would be more properly decided by a State forum."[3] The order of remand cannot be "col-

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[3] The order of remand stated in relevant part:

> Before the Court is a "Motion and Order to Remand" (doc. #1254) filed by Brookshire Brothers, wherein the mover seeks to remand the instant case to state court because the Court lost subject matter jurisdiction when Total Containment Inc. and its insurers were dismissed, either voluntarily or involuntarily. Brookshire Brothers maintains that an event post-removal can destroy subject matter jurisdiction and require remand under 28 U.S.C. §1447(c).
>
> Under 28 U.S.C. § 1367(c), this Court has discretion as to whether to keep the current pending claims or re-

orably characterized" as being based on lack of subject matter jurisdiction under section 1447(c). *Cf Powerex*, 127 S. Ct. at 2418–19 (finding that there was no reason to believe that the district court's remand was actually based on section 1367(c) because the court never mentioned the possibility of supple-

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mand to State court. 28 U.S.C. § 1367(c) provides the following pertinent language:

> The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if–
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

The Court has considered these factors and concludes that each factor militates in favor of remand. There is no doubt that this products liability case involves complex issues of State law, nor is there any doubt that the only reason this case was removed to federal court was because it was related to a bankruptcy proceeding which is no longer relevant to the instant case. While it is certainly within our discretion to retain this case for further proceedings, after examining the factors enumerated in § 1367(c), the Court finds that the suit before us contains only issues of State law, and in the interest of comity, these State law issues would be more properly decided by a State forum. Accordingly,

IT IS ORDERED that the motion and order to remand is hereby GRANTED. The cause is remanded to the 14th Judicial District Court for the Parish of Calcasieu, State of Louisiana.

mental jurisdiction, there was no indication that the parties ever even argued to the district court that supplemental jurisdiction was a basis for retaining the case, and the court explicitly relied upon lack of subject-matter jurisdiction in its order of remand). Because the order of remand was a discretionary remand pursuant to section 1367(c), that order is reviewable on appeal for abuse of discretion. *See Regan*, 524 F.3d at 631.

III. Whether The District Court Abused Its Discretion In Remanding The Suit

In assessing whether a district court abused its discretion by declining supplemental jurisdiction over state law claims under 28 U.S.C. § 1367, this Court is guided by the statutory factors set forth in section 1367(c) as well as the common law factors of judicial economy, convenience, fairness, and comity. *Mendoza v. Murphy*, 532 F.3d 342, 346 (5th Cir. 2008) (citations omitted). Section 1367 authorizes a court to decline supplemental jurisdiction over a state law claim if: (1) the claim raises a novel or complex issue of state law; (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction; (3) the district court has dismissed all claims over which it has original jurisdiction; or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction. 28 U.S.C. § 1367(c). The general rule is that a court should decline to exercise jurisdiction over remaining state-law claims when all federal-law claims are eliminated before trial, but this rule is neither mandatory nor absolute; no single factor is dispositive, and this Court must review the district court's decision in light of the specific circumstances of the case at bar. *See Batiste v. Island*

Records Inc., 179 F.3d 217, 227 (5th Cir. 1999) (citations omitted).

Our case law is clear that when a district court declines to exercise jurisdiction over remaining state law claims following the dismissal of all federal-law claims and remands a suit after investing a significant amount of judicial resources in the litigation analogous to that invested by the district court in this case, that court has abused its discretion under 28 U.S.C. § 1367. *See Batiste*, 179 F.3d at 227–28 (holding that the district court abused its discretion in declining to exercise supplemental jurisdiction over remaining state-law claims due to the absence of any difficult state-law issue in the remaining claims and the district court's intimate familiarity with the claims as a result of the fact that the case had been pending in the district court for almost three years, produced more than sixteen volumes of record, resulted in numerous depositions and discovery disputes, and required significant consideration by the district court of multiple motions to dismiss claims or grant summary judgment); *Newport Ltd. v. Sears, Roebuck and Co.*, 941 F.2d 302, 308 (5th Cir. 1991) (holding that the district court abused its discretion in remanding state law claims because those claims presented no novel or especially unusual questions and the litigation in federal court had proceeded for four years and produced twenty-three volumes and thousands of pages of record, resulted in the preparation of a pretrial order exceeding two-hundred pages, over a hundred depositions, and nearly two-hundred-thousand pages of discovery production); *see also Mendoza*, 532 F.3d at 346–47 (finding that district court did not abuse its discretion in retaining jurisdiction over state law claims after it had dismissed all claims over which it had

original jurisdiction because the state law issues were neither novel nor complex; by the time the district court ruled on the motion to decline supplemental jurisdiction, the case against defendants had been pending for well over a year, the discovery deadline had passed, and the parties had fully briefed defendants' motion for summary judgment; and it was not unfair to plaintiffs simply because there was a risk of duplicative litigation in state court); *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 456 (5th Cir. 1996) (finding that district court did not abuse its discretion in retaining jurisdiction over state law claims because it did not raise any novel or unsettled issues of state law and, at the time of remand, the lawsuit had been in litigation for more than two years, the trial date was less than a month away, the parties had already filed more than 300 pleadings, most of the parties had already prepared extensive discovery disclosures, and summary judgment motions on behalf of many of the remaining defendants were pending); *Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 587–90 (5th Cir. 1992) (finding that the district court abused its discretion in retaining jurisdiction over state-law claims following the dismissal of all federal-law claims because the proceedings were at a relatively early stage when the district court elected to retain jurisdiction after dismissing all federal claims—the case had been pending for only nine months and discovery had not been completed—and there was no indication that the district judge had substantial familiarity with the merits of the case; trying the remaining state issues in state court would not impose any significant additional burdens on the parties such as repeating the effort and expense of the discovery process; the relitigation of procedural matters in

state court would not pose any undue hardship; and the case involved difficult state-law issues that were best left to the state courts).

Additionally, although the district court stated in its order of remand that "[t]here is no doubt that this products liability case involves complex issues of State law . . . and in the interest of comity, these State law issues would be more properly decided by a State forum," the remaining state-law issues in this case do not appear to be particularly novel or complex, and many of them may not even require the application of Louisiana substantive law. Brookshire points to two remaining issues of Louisiana law that "lie at the heart of this case"—choice of law and prescription—and that a Louisiana state court would be better equipped to handle. Neither appears to involve anything other than the routine choice of law or prescription analysis that would arise in any products liability case. Neither the district court nor Brookshire has provided any explanation of why these areas of Louisiana law are particularly difficult to apply in this case. Indeed, the district court has already addressed these issues in this case, applying Louisiana prescription law and determining that Brookshire's claims against one of the parties arising in Texas should be governed by Texas substantive law. Regardless, even if this case involved novel or complex state law issues, the significant amount of judicial resources invested by the district court would lead us to find that the district court abused its discretion in remanding this case.

Finally, one more reason for reversing the remand order is that, if the order is not reversed, there is a significant risk that Brookshire will attempt to re-litigate in state court rulings made against it by

the district court, including those relating to choice of law, prescription, breach of implied warranty, and application of Texas's economic-loss rule, and that this would cause the flexpipe defendants substantial prejudice. *Cf. Mendoza*, 532 F.3d at 347 ("Plaintiffs complain that by retaining jurisdiction, the district court ran the risk of duplicating similar litigation in state court. But Plaintiffs themselves created the duplicate litigation after having expressly stated in their federal court pleadings a desire to avoid 'dual track litigation.'"); *Parker & Parsley*, 972 F.2d at 588 ("[W]e do not expect the relitigation of other matters to pose undue hardship. The defendants can hardly contest jurisdiction, and we do not see other obstacles to resolution of the case in the state court, save those that ought to be there . . . .").

Considering the statutory factors set forth in section 1367(c) as well as the common law factors of judicial economy, convenience, fairness, and comity as applied to this case, we find that the district court abused its discretion by declining supplemental jurisdiction over the remaining state law claims and remanding this suit to state court. We REVERSE the ruling of the district court and REMAND the case for further proceedings.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

BROOKSHIRE BROTHERS HOLDING, INC., ET AL	**Docket No. 04-1150**
vs.	**Judge Trimble**
TOTAL CONTAINMENT INC., ET AL	**Magistrate Judge Wilson**

ORDER

Before the Court is a "Motion and Order to Remand" (doc. #1254) filed by Brookshire Brothers, wherein the mover seeks to remand the instant case to state court because the Court lost subject matter jurisdiction when Total Containment Inc.[1] and its insurers were dismissed, either voluntarily or involuntarily. Brookshire Brothers maintains that an event post-removal can destroy subject matter jurisdiction and require remand under 28 U.S.C. § 1447(c).

Under 28 U.S.C. § 1367(c), this Court has discretion as to whether to keep the current pending claims or remand to State court. 28 U.S.C. § 1367(c) provides the following pertinent language:

---

[1] TCI filed bankruptcy approximately seven (7) months after Brookshire Brothers filed the instant suit against TCI and other defendants in State court.

The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if -

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

The Court has considered these factors and concludes that each factor militates in favor of remand. There is no doubt that this products liability case involves complex issues of State law, nor is there any doubt that the only reason this case was removed to federal court was because it was related to a bankruptcy proceeding which is no longer relevant to the instant case.[2] While it is certainly within our discretion to retain this case for further proceedings, after examining the factors enumerated in § 1367(c), the Court finds that the suit before us contains only issues of State law, and in the interest of comity, these State law issues would be more properly decided by a State forum. Accordingly,

IT IS ORDERED that the motion and order to remand is hereby **GRANTED**. The cause is re-

---

[2] Plaintiffs are not seeking a judgment against Total Containment, Inc. and all of its insurers have been dismissed either voluntarily or involuntarily.

manded to the 14th Judicial District Court for the Parish of Calcasieu, State of Louisiana .

IT IS FURTHER ORDERED that the Clerk of Court certify a copy of this judgment and forward the same to the Clerk of the 14th Judicial District Court for the Parish of Calcasieu, State of Louisiana.

THUS DONE AND SIGNED in Chambers at Alexandria, Louisiana, this 27th day of November, 2007.

/s/

JAMES T. TRIMBLE, JR.

UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed: February 5, 2009

No. 07-31154

BROOKSHIRE BROTHERS HOLDING, INC., BROOKSHIRE BROTHERS MANAGEMENT INC; BROOKSHIRE BROTHERS LTD

Plaintiffs-Appellees

v.

DAYCO PRODUCTS INC, SHELL CHEMICAL LP; TICONA POLYMERS INC; MARK IV INDUSTRIES LTD; UNDERWRITERS LABORATORIES INC

Defendants-Appellants

Appeal from the United States District Court
for the Western District of Louisiana, Lake Charles

ON PETITION FOR REHEARING EN BANC

Before HIGGINBOTHAM, BENAVIDES, and STEWART, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

APPENDIX D

Statutory Provisions Involved

28 U.S.C. § 1334(b):

Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 1367:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

. . . . .

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if —

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1447:

. . . . .

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

No. 08-1233

Supreme Court, U.S.
FILED
MAY 29 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BROOKSHIRE BROTHERS HOLDING, INC., *et al.*,

Petitioners,

v.

DAYCO PRODUCTS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS TICONA POLYMERS, INC., SHELL CHEMICAL LP, AND UNDERWRITERS LABORATORIES INC.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court's order remanding the case to state court following its discretionary decision to decline to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c) is barred from appellate review by 28 U.S.C. § 1447(d)?

2. Whether the district court's order remanding the case to state court under 28 U.S.C. § 1367(c) is barred from appellate review under 28 U.S.C. § 1452(b), even though the district court's remand order relied exclusively upon 28 U.S.C. § 1367(c) and never cited 28 U.S.C. § 1452(b)?

LIST OF PARTIES AND RULE 29.6 NOTATION

The following persons were parties to the proceedings in the court of appeals:

Plaintiffs-appellees-petitioners:

Brookshire Brothers Holding, Inc.

Brookshire Brothers Management, Inc.

Brookshire Ltd.

Defendants-appellants-respondents:

Dayco Products, Inc.

Mark IV Industries, Inc.

Shell Chemical LP

Ticona Polymers, Inc.

Underwriters Laboratories Inc.

Respondent, Dayco Products, Inc. ("Dayco"), is a wholly owned subsidiary of its parent, Mark IV Industries, Inc. ("Mark IV"). No publicly held company owns 10% or more of Dayco's stock. Respondent, Mark IV, is a wholly owned subsidiary of its parent, MIV Holdings, S.A., a Luxembourg Company. No publicly held company owns 10% or more of Mark IV's stock. On April 30, 2009, Dayco and Mark IV filed voluntary petitions for relief in the United States Bankruptcy Court for the Southern District of New York under 11 U.S.C. §§ 101 *et seq*. As such, all claims against Dayco and Mark IV are automatically stayed pursuant to 11 U.S.C. § 361(a).

Respondent, Shell Chemical LP, is a Delaware limited partnership whose general partner is Shell Oil Company and whose limited partner is SCOGI, LP. Its general partner, Shell Oil Company, is a wholly owned subsidiary of its parent, Shell Petroleum Inc., which in turn is owned by Shell Petroleum N.V. Two publicly held companies, Royal Dutch Petroleum Company and The "Shell" Transport and Trading Company, plc, respectively own 60% and 40% of the stock of Shell Petroleum N.V.

Respondent, Ticona Polymers, Inc., now known as Ticona, is a business of Celanese Corporation, a publicly traded company.

Respondent, Underwriters Laboratories Inc., is an independent, not-for-profit corporation which has no parent. No publicly held company owns 10% or more of Underwriters Laboratories Inc.'s stock.

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INTRODUCTION

The Petition for a Writ of Certiorari filed by Brookshire Brothers Holding, Inc., Brookshire Brothers Management, Inc., and Brookshire Brothers Ltd. (collectively, "Brookshire") concerns the identical issue which the Court recently resolved in *Carlsbad Technology, Inc. v. HIF Bio, Inc.*, 556 U.S. ___, 129 S.Ct. 1862 (May 4, 2009). There, like here, the question presented was whether a federal court of appeals has jurisdiction to review a district court's order remanding a case to state court after declining to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c). This Court held unequivocally that a federal court of appeals may review such a remand order because "[w]hen a district court remands claims to a state court after declining to exercise supplemental jurisdiction, the remand order is not based on a lack of subject-matter jurisdiction for purposes of §§ 1447(c) and (d)." 129 S.Ct. at 1867. The result should be no different here.

This case was removed from Louisiana state court to federal court in May 2004 on the ground that it was "related to" the bankruptcy of one of the defendants. At the time of removal, Brookshire did not move to remand the case to state court. To the contrary, Brookshire admitted that federal subject matter jurisdiction existed and that the case had been properly removed to federal court. However, more than three years later and just months before the case was scheduled for trial in federal court, Brookshire moved to remand the case to state court, arguing that the claims relating to the bankrupt entity had been resolved.

Despite the impending trial date and despite devoting enormous resources to the case, the federal court declined to exercise supplemental jurisdiction over the remaining state law claims under 28 U.S.C. § 1367(c), and remanded the case to the Louisiana state court. On appeal, the Fifth Circuit reversed, holding that: (1) it had jurisdiction to review the remand order; and (2) the district court had abused its discretion in declining to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c) because of, among other things, the significant investment of judicial resources and the likelihood that defendants would be prejudiced by remand to state court.

Brookshire's Petition states no valid ground for this Court to grant review of the Fifth Circuit's decision. Brookshire claims only that the Fifth Circuit did not have jurisdiction to review the remand order because (i) remands for lack of subject matter jurisdiction are not reviewable under 28 U.S.C. §§ 1447(c) and (d); and (ii) 28 U.S.C. § 1452(b) bars review of orders remanding cases "related to" a bankruptcy. As shown below, both arguments are meritless.

First, as Brookshire admits, this case concerns the very same issue which the Court decided in *Carlsbad Technology*. As the Court made clear in *Carlsbad Technology*, the statutory bar under 28 U.S.C. § 1447(d) against appellate review of remand orders for lack of subject matter jurisdiction is inapplicable where, as here, the remand was issued under 28 U.S.C. § 1367(c). Thus, consistent with *Carlsbad Technology*, the Fifth Circuit properly exercised its appellate jurisdiction to review the district court's remand order under § 1367(c) for an abuse of discretion.

Second, the statutory bar under 28 U.S.C. § 1452(b) against appellate review of orders remanding cases "related to" bankruptcy matters is inapplicable here. Neither the parties nor the Fifth Circuit raised the issue on appeal, and thus it is not properly before this Court. Moreover, even if Brookshire had properly preserved the issue, the district court's remand order was based expressly and solely upon § 1367(c), and the courts below never cited or referenced § 1452(b). Finally, Brookshire argues simply and erroneously that the Fifth Circuit may have been incorrect in reviewing the remand order. Such an argument does not warrant review by this Court, which requires (among other things) a conflict with a decision of this Court or another United States court of appeals, or an important, but unresolved, question of federal law — none of which is even alleged here.

COUNTERSTATEMENT OF THE CASE

Respondents — Ticona Polymers, Inc., Shell Chemical LP, and Underwriters Laboratories Inc. — adopt and incorporate by reference the Fifth Circuit's statement of the factual background and procedural history as set forth in its published opinion.[1] (*See* Brookshire's Appendix A, at 1a-14a.) Set forth below are only those facts salient to the matter now before this Court.

---

1. In light of their recent bankruptcy filing, Dayco and Mark IV have not joined this Opposition. However, counsel for Dayco and Mark IV have provided written assurances that they have no objection to the filing of this Opposition.

I. *Trial Court Proceedings*

On August 15, 2003, Brookshire filed this products liability action in Louisiana state court against multiple defendants (including Respondents), alleging damage from leaking underground pipes at gasoline stations in Texas and Louisiana. (*Id.* at 2a.) Thereafter, on May 26, 2004, the action was removed to the United States District Court for the Western District of Louisiana (the "District Court") pursuant to 28 U.S.C. §§ 1334(b) and 1452 on the ground that it was "related to" the bankruptcy of one of the defendants, Total Containment, Inc. ("TCI"). (*Id.*) In the courts below, Brookshire "concede[d] that the case was properly removed and that the district court had [subject matter] jurisdiction over the suit at the time of removal." (*Id.*)

Following removal, this case was actively litigated in the District Court for more than three years, generating in excess of 1,300 entries in the District Court's docket. *Id.* During that time, the District Court decided 41 dispositive motions, as well as 14 *Daubert* and 7 *in limine* motions related to proposed expert testimony. (*Id.*) The District Court also addressed several procedural and substantive issues in the case under Texas and Louisiana law, including choice of law and the statute of limitations. (*Id.* at 2a & 13a.)

After discovery had closed and as the parties were making final preparations for the February 11, 2008 trial date, Brookshire, TCI, and TCI's insurers settled their disputes and filed a joint stipulation dismissing Brookshire's claims against those defendants. (*Id.* at 3a.) Shortly thereafter, on November 2, 2007, Brookshire moved to remand the case to Louisiana state court. (*Id.*)

On November 27, 2007, the District Court granted Brookshire's motion, specifically declining to exercise supplemental jurisdiction over the remaining state law claims under § 1367(c). (Brookshire's Appendix B, at 15a-17a.) The language of the District Court's order is clear and unambiguous. Not only does the remand order quote § 1367(c) in its entirety and cite the statute several times, but it cites no other authority. Indeed, in declining to exercise supplemental jurisdiction, the remand order provides expressly that "[u]nder 28 U.S.C. § 1367(c), this Court has discretion as to whether to keep the current pending claims or remand to State court." (*Id.* at 15a.) The District Court then ruled that "[w]hile it is certainly within our discretion to retain this case for further proceedings, after examining the factors enumerated in § 1367(c) . . . [this case] would be more properly decided by a State forum." (*Id.* at 16a.) Thereafter, Respondents timely filed a notice of appeal.

II. *The Fifth Circuit's Decision*

Soon after Respondents filed their notice of appeal, Brookshire moved to dismiss the appeal solely on the ground that the Fifth Circuit lacked jurisdiction under 28 U.S.C. § 1447. Following briefing on the matter, on February 6, 2008 the Fifth Circuit denied that motion.

In its brief on the merits, Brookshire argued only that the Fifth Circuit should (i) dismiss the appeal for lack of jurisdiction under 28 U.S.C. § 1447; and (ii) affirm the District Court's discretionary remand under 28 U.S.C. § 1367(c). Brookshire never argued, much less suggested, that the Fifth Circuit lacked jurisdiction under 28 U.S.C. § 1452(b). (Brookshire's Appendix A, at 3a.)

Consistent with established jurisprudence, on January 6, 2009 the Fifth Circuit rejected each of Brookshire's arguments and reversed the District Court's discretionary remand order, holding:

- That appellate jurisdiction existed to review the remand order because the District Court did not remand the case on any of the grounds specified in § 1447(c) for lack of subject matter jurisdiction or for a defect in removal procedure. (*Id.* at 3a-4a.) Rather, the Fifth Circuit explained that the District Court expressly based its remand order on § 1367(c) and that the remand order could not be, as Brookshire argued, "colorably characterized" as a remand for lack of subject matter jurisdiction under § 1447(c). (*Id.* at 8a-9a.) As a discretionary remand under § 1367(c), the District Court's order was therefore reviewable on appeal for abuse of discretion, and was not barred under §§ 1447(c) and (d). (*Id.* at 10a); and

- That under the statutory factors set forth in § 1367(c) and the common law factors of judicial economy, convenience, fairness and comity, the District Court had abused its discretion by declining supplemental jurisdiction over the remaining state law claims and remanding the case to state court. (*Id.* at 10a-14a.) In so ruling, the Fifth Circuit noted that the District Court had invested a significant amount of resources in the case over the course of three years and that the remaining issues of state law were not novel or complex. (*Id.* at 13a.) The Fifth Circuit

> further recognized that there was "a significant risk that Brookshire will attempt to re-litigate in state court rulings made against it by the district court, including those relating to choice of law, prescription, breach of implied warranty, and application of Texas's economic-loss rule, and that this would cause the flexpipe defendants substantial prejudice." (*Id.* at 13a-14a.)

As a result, the Fifth Circuit remanded the case to the District Court for all further proceedings. (*Id.* at 14a.) Brookshire then filed a petition for rehearing en banc, which the Fifth Circuit denied on February 5, 2009. (Brookshire's Appendix C, at 18a-19a.)

III. *Brookshire's Conduct Following The Fifth Circuit's Ruling*

The Fifth Circuit's concerns about Brookshire's litigation tactics were well-founded. On January 7, 2009 — the day after the Fifth Circuit's decision — Brookshire's counsel sent a letter to the Louisiana state court judge, asserting that the state court could proceed with a previously scheduled hearing on January 26, 2009 concerning numerous pending motions. In response, the Louisiana state court judge sent a letter to all counsel, stating that he would proceed with the case, including the January 26 hearing. Thereafter, on January 16, 2009, Brookshire filed numerous pleadings in the Louisiana state court requesting, among other things, that the state court revisit many of the federal District Court's prior rulings on summary judgment and other substantive issues. As a result, Respondents moved to stay all further proceedings in the state court. That motion was denied by the state court.

Subsequently, on January 20, 2009, Respondents filed an emergency motion in the Fifth Circuit to, among other things, enjoin all proceedings in the Louisiana state court. Following briefing, on January 23, 2009 the Fifth Circuit granted Respondents' motion. (*See* Respondents' Appendix A, attached hereto.) The Fifth Circuit did so in aid of its own jurisdiction, to prevent the Louisiana state court from interfering with the District Court's authority, and to protect Respondents' rights to proceed in a federal forum consistent with the Fifth Circuit's decision. (*Id.* at 2a-3a.) As the Fifth Circuit explained, "[p]ermitting the state court to rule on dispositive motions in this suit, which, as our opinion made clear, is properly before the federal district court, would seriously interfere with the federal district court's consideration of the case and deprive the defendants-appellants of their right to proceed in a federal forum." (*Id.*)

REASONS FOR DENYING THE PETITION

I. Brookshire's First Question Presented States No Valid Ground For Review In Light Of This Court's Recent Holding In *Carlsbad Technology, Inc. v. HIF Bio, Inc.*

Brookshire admits that its Petition raises the identical question presented in *Carlsbad Technology, Inc. v. HIF Bio, Inc.*, 556 U.S. ___, 129 S.Ct. 1862 (May 4, 2009), and has urged this Court to "hold" the Petition "pending the decision" in that case. (Pet. at 1.) This Court has now rendered its opinion in *Carlsbad Technology*, which all members of the Court joined and which conclusively determines Brookshire's first Question Presented. As the Court held in *Carlsbad*

Technology: "When a district court remands claims to state court after declining to exercise supplemental jurisdiction, the remand order is not based on a lack of subject-matter jurisdiction for purposes of §§ 1447(c) and (d)," and therefore appellate review of such an order is not barred by 28 U.S.C. § 1447(d). 129 S.Ct. at 1867. The Fifth Circuit's decision at issue here is fully consistent with *Carlsbad Technology*, and Brookshire states no reason for this Court to grant review of the same question definitively resolved in that case.

In *Carlsbad Technology*, the Court addressed the following question: "Whether a district court's order remanding a case to state court following its discretionary decision to decline to exercise the supplemental jurisdiction accorded to federal courts under 28 U.S.C § 1367(c) is properly held to be a remand for a 'lack of subject matter jurisdiction' under 28 U.S.C. § 1447(c) so that such remand order is barred from any appellate review by 28 U.S.C. § 1447(d)." (Brief for the Petitioner in *Carlsbad Technology* at ii; 129 S.Ct. at 1864, 1866.) As Brookshire admits, "[t]his case presents the same issue . . . presented by . . . *Carlsbad Tech., Inc. v. HIF Bio, Inc.*" (Pet. at 7; *see also id.* at i, Question Presented #1 ("Whether the district court's order remanding the case to state court following its discretionary decision to decline to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c) is barred from appellate review by 28 U.S.C. § 1447(d)").) As Brookshire also admits, "this case likely will be controlled by this Court's decision in *Carlsbad Technologies*." (Pet. at 7.)

It is not just "likely" that this Court's holding in *Carlsbad Technology* controls the outcome of this case — it is certain. The facts of this case as alleged by Brookshire are consistent with the facts of *Carlsbad Technology*. Both cases involved properly removed claims over which the district court had subject matter jurisdiction, as well as supplemental state law claims under 28 U.S.C. § 1367(a). *See* Pet. at 3 (removal of "related-to" bankruptcy claims under 28 U.S.C. §§ 1334 and 1452(a), as well as state law claims); 129 S.Ct. at 1865 (removal of Racketeer Influenced & Corrupt Organizations Act ("RICO") claim under 28 U.S.C. §§ 1961-1968, as well as state law claims). In both cases, the federal claim that existed at the time of removal was later disposed of in the federal court, leaving only the supplemental state law claims remaining. *See* Pet. at 3 (Brookshire settled with the party which had filed for bankruptcy, and that party's insurers were either dismissed on summary judgment, dismissed by Brookshire, or settled with Brookshire; state law claims remained against the other parties); 129 S.Ct. at 1865 (RICO claim dismissed pursuant to Fed. R. Civ. P. 12(b)(6); state law claims remained). And in both cases, the district court declined to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c) over the remaining state law claims and remanded the case to state court. *See* Brookshire's Appendix B at 16a (declining to exercise supplemental jurisdiction under § 1367(c), and remanding the case to state court); 129 S.Ct. at 1865 ("The District Court also declined to exercise supplemental jurisdiction over the remaining state-law claims pursuant to 28 U.S.C. § 1367(c)(3) . . . .").

Moreover, just like the petitioner in *Carlsbad Technology*, Brookshire argues that because the bankruptcy-related claims had been disposed of at the time

the District Court considered the motion to remand under § 1367(c), the District Court lacked subject matter jurisdiction and was required to remand the case under §§ 1447(c) and (d). (Pet. at 14.) However, in *Carlsbad Technology*, the Court squarely addressed and rejected that argument. The result should be no different here.

First, in *Carlsbad Technology*, the Court reaffirmed its holding in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345-46 (1976), that the prohibition on review of remand orders contained in § 1447(d) must be read *in pari materia* with § 1447(c), thus limiting the remands barred from appellate review by § 1447(d) to those which are based on a ground specified in § 1447(c).[2] 129 S.Ct. at

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2. As this Court has repeatedly recognized for the more than three decades since *Thermtron*, § 1447(d) prohibits appellate review of remand orders only where, unlike here, the district court specifies a ground for remand within the scope of 28 U.S.C. § 1447(c) for lack of subject matter jurisdiction or for a timely raised defect in removal procedure. *See Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 231 (2007) ("[W]hen a district court remands a properly removed case because it nonetheless lacks subject-matter jurisdiction, the remand is covered by § 1447(c) and thus shielded from review by § 1447(d)"); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-12 (1996) (explaining that "§ 1447(d) must be read *in pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)"); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-28 (1995) ("As long as a district court's remand is based on a timely raised defect in removal procedure or on lack of subject-matter jurisdiction — the grounds for remand recognized by § 1447(c) — a court of appeals lacks jurisdiction to entertain an appeal of the remand order under § 1447(d)").

1865-66.[3] Second, this Court made clear in *Carlsbad Technology* that there is a distinction between (1) whether a court has subject matter jurisdiction over a claim, and (2) whether a court chooses to exercise that jurisdiction. *Id.* at 1866. Applying that distinction, this Court explained that with respect to supplemental jurisdiction, a federal court has subject matter jurisdiction over state law claims, but has discretion in determining whether to exercise such jurisdiction. *Id.* "A district court's decision whether to exercise that [supplemental] jurisdiction after dismissing every claim over which it had original jurisdiction is purely discretionary." *Id.* (citation omitted). As a result, a district court's exercise of its discretion under § 1367(c) is not a jurisdictional matter. *Id.* at 1867. Because that decision is discretionary (not jurisdictional), a § 1367(c) remand order "is not based on a 'lack of subject matter jurisdiction' for purposes of the bar to appellate review created by §§ 1447(c) and 1447(d)." *Id.* The Fifth Circuit's decision at issue here, which reviewed the District Court's discretionary remand order under § 1367(c), is fully consistent with this Court's reasoning.[4] *See* Brookshire's Appendix A at 1a-14a.

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3. This Court stated that it was not revisiting whether *Thermtron* was correctly decided and further noted that neither party had asked the Court to revisit *Thermtron*. *Carlsbad Technology*, 129 S.Ct. at 1865-66 n.*. Brookshire likewise does not request that this Court overrule its prior opinion in *Thermtron*. To the contrary, Brookshire has attempted to "reconcile" *Thermtron's* holding with its arguments, and seeks a result "consistent with *Thermtron's* reasoning." *See* Pet. at 10 & 14.

4. Similarly, Brookshire's argument at pages 10-14 of its Petition — *i.e.*, that the 1988 and 1996 amendments to 28 U.S.C. § 1447(c) somehow cause the scope of remand orders for which

(Cont'd)

Given this Court's unequivocal decision in *Carlsbad Technology*, it is clear that the Fifth Circuit had jurisdiction to review the District Court's remand order, and there are no grounds for this Court to review Brookshire's first question presented.

II. The Statutory Bar Under 28 U.S.C. § 1452(b) Against Appellate Review Of Orders Remanding Cases "Related To" Bankruptcy Matters Is Inapplicable Here

Despite Brookshire's claim (Pet. at 14-20), the statutory bar under 28 U.S.C. § 1452(b) against appellate review of orders remanding cases "related to" bankruptcy matters is inapplicable here, and thus provides no grounds for this Court to grant certiorari.

A. *Brookshire Failed To Preserve This Issue For Review By The Court*

Brookshire admits that it raised this issue for the first time in its Petition for a Writ of Certiorari, having never argued that 28 U.S.C. § 1452(b) barred the Fifth Circuit from reviewing the remand order in its motion to dismiss Respondents' appeal for lack of jurisdiction, its brief on the merits, or its petition for rehearing en

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(Cont'd)

appellate review is barred by § 1447(d) to include remand orders under § 1367(c) — was briefed by the parties in *Carlsbad Technology*, raised during oral argument, and rejected by this Court. *See Carlsbad Technology*, Brief for Petitioner at 31-41 & n.6; Brief for Respondents at 12-13 & n.9, 10; Reply Brief for Petitioner at 23-25; and Oral Argument Transcript at 17 (Feb. 24, 2009).

banc. (Pet. at 6, 19.) As this Court has explained, a question presented for the first time in a petition for certiorari "is not properly before us." *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981). *See also Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168-69 (2004) (explaining that "'[w]e ordinarily do not decide in the first instance issues not decided below'") (citation omitted); *TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001) (same).[5] Given Brookshire's admission, it is beyond dispute that this issue was not properly preserved for review by this Court.

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5. Nonetheless, Brookshire cites authority for the unremarkable proposition that subject matter jurisdiction cannot be waived. *See United States v. Storer Broad. Co.*, 351 U.S. 193 (1956); *Glidden v. Zdanok*, 370 U.S. 530 (1962); *City of Gainesville v. Brown-Crummer Invest. Co.*, 277 U.S. 54 (1928); *Mansfield v. Swan*, 111 U.S. 379 (1884). However, subject matter jurisdiction is not at issue here. To the contrary, the issue presented by Brookshire concerns only appellate jurisdiction. Unlike appellate jurisdiction, subject matter jurisdiction concerns the power of the federal courts to hear a matter in the first instance. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (explaining that subject matter jurisdiction cannot be waived because "it involves the court's power to hear a case") (citation omitted). By contrast, appellate jurisdiction concerns whether a court of appeals may review a matter which has already been litigated in the federal courts. *Cf. Youngblood v. West Virginia*, 547 U.S. 867, 874 (2006) (Scalia, J., dissenting) ("'[I]t is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted. . .'") (quoting *Marbury v. Madison*, 1 Cranch 137, 175 (1803)).

B. *The District Court's Remand Order Was Expressly And Unambiguously Under § 1367(c), And Thus § 1452(b)'s Bar On Appellate Review Is Irrelevant*

Even if Brookshire had preserved the issue, its argument is beside the point and provides no grounds for the Court's review of the matter. As Brookshire admits (Pet. at 15-16), the District Court's remand order was based solely and expressly upon § 1367(c), and the courts below never cited, much less relied upon, § 1452(b). (*See* Brookshire's Appendix B, at 15a-17a.) An appellate court should not "decipher the tea-leaves of a district court's remand order" where, as here, it makes a "clear-statement" that it was issued under § 1367(c). *See Certain Underwriters at Lloyds v. Warrantech Corp.*, 461 F.3d 568, 572-73 (5th Cir. 2006); *Heaton v. Monogram Credit Card Bank of Georgia*, 231 F.3d 994, 997-98 (5th Cir. 2000) (same).[6] Thus, § 1452(b)'s bar to appellate review is irrelevant here, given (among other things) the clear statements in the remand order.

Faced with the plain language of the remand order, Brookshire argues erroneously that (1) the § 1367(c) factors relied upon by the District Court somehow constitute equitable grounds under § 1452(b); and (2) the remand order allegedly should be construed under § 1452(b) because the case was removed to federal court under § 1452(a). (Pet. at 15-18.) Brookshire is wrong.

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6. While this Court has yet to address the issue, Justice Scalia recently stated that "appellate courts [should not] look behind the stated basis for the district court's remand order." *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 650 (2006) (Scalia, J., concurring).

First, while there may be some overlap in the factors considered under § 1367(c) and § 1452(b), there are critical differences. Most significantly, under § 1452(b), courts must consider various factors that concern bankruptcy-related issues, including: (1) the existence of a right to a jury trial; (2) the effect on the efficient administration of the bankruptcy estate; and (3) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case. *See In re Adelphia*, 285 B.R. 127, 144 (S.D.N.Y. 2002) (citation omitted); 1-3 Collier on Bankruptcy, p. 3.07[5] (15th ed. Rev. 2009). None of these factors, however, are considered under § 1367(c). *See Carnegie Mellon v. Cohill*, 484 U.S. 343, 350 (1988) (instructing the lower courts to focus on principles of judicial economy, convenience, fairness and comity under § 1367(c)). Given the additional, bankruptcy-related factors under § 1452(b) and the unambiguous language of the remand order relying solely upon § 1367(c), it strains credulity for Brookshire to even argue that the factors the District Court considered in remanding the case constituted equitable grounds under § 1452(b).[7]

Second, there is no basis to construe the remand order as being under § 1452(b) simply because the case

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7. Oddly, Brookshire cites a handful of cases for the non-controversial proposition that the "equitable" grounds under § 1452(b) should be construed broadly. (Pet. at 15.) However, none of those cases even addresses § 1367(c). *See Things Remembered*, 516 U.S. 124; *In re Seven Fields Dev. Corp.*, 505 F.3d 237 (3d Cir. 2007); *Allied Signal Recovery Trust v. Allied Signal, Inc.*, 298 F.3d 263 (3rd Cir. 2002); *Hawking v. Ford Motor Co.*, 210 F.3d 540 (5th Cir. 2000); *Cathedral of the Incarnation v. Garden City Co.*, 90 F.3d 28 (2d Cir. 1996).

was originally removed to federal court on "related to" bankruptcy grounds. As this Court has observed, "[t]here is no express indication in § 1452 that Congress intended that statute to be the exclusive provision governing removals and remands in bankruptcy." *Things Remembered*, 516 U.S. at 129. In addition, the Fifth Circuit has explained that where, as here, a case is removed under § 1452(a) and the bankruptcy-related claims are later dismissed, leaving supplemental state law claims within the court's jurisdiction, "the court's remand authority switches from that under § 1452 to that under § 1367." *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 455 n.3 (5th Cir. 1996) (citing *Cohill*, 484 U.S. at 354 n.11 for the proposition that "the remand authority conferred by the removal statute and the remand authority conferred by the doctrine of pendent jurisdiction overlap not at all").

Further undercutting Brookshire's argument is that supplemental jurisdiction under § 1367(c) can indeed exist over state law claims in a case which is "related to" a bankruptcy matter. *See, e.g., Security Farms v. Int'l Brotherhood of Teamsters*, 124 F.3d 999, 1008 n.5 (9th Cir. 1997) (recognizing that the case was "related to" a bankruptcy matter, and also included state law claims over which the federal court had supplemental jurisdiction); *Doddy*, 101 F.3d at 455 n.3 (explaining that where, as here, a case is removed to federal court on "related to" grounds, the district court also had supplemental jurisdiction over pendent tort claims); *In re Cuyahoga Equipment Corp.*, 980 F.2d 110, 115 (2d Cir. 1992) ("Given an independent jurisdictional source like that provided by § 1334(b), federal courts possess supplemental jurisdiction over related claims").

Here, once the claims against the bankrupt entity and its insurers were resolved by settlement or dismissal after removal, only the supplemental state law claims remained against the non-bankrupt defendants. As such, the District Court's discretionary remand order was purely and simply under § 1367(c), not § 1452(b), and the Fifth Circuit had jurisdiction to review the remand order consistent with *Carlsbad Technology*.

C. *Brookshire's Argument Does Not Warrant Review By This Court*

Not only is Brookshire's argument incorrect, but it fails to merit review by this Court. Brookshire does not argue that the Fifth Circuit's decision conflicted with any decision of this Court or another United States court of appeals on the same important matter, or that the Fifth Circuit decided an important question of federal law which has not been, but should be, decided by this Court. *See* Sup. Ct. R. 10(a) & (b). Rather, Brookshire argues simply and erroneously that the Fifth Circuit should not have reviewed the remand order. Assuming *arguendo* (and contrary to fact and law) that the Fifth Circuit was barred from reviewing the remand order, Brookshire's argument plainly does not warrant review by this Court. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). *Cf. Powell v. Nevada*, 511 U.S. 79, 86 (1994) (Thomas, J., dissenting) (noting that the writ of certiorari should only be granted "in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where

there is a real and embarrassing conflict of opinion between the circuit courts of appeal") (citation omitted). This case presents no such compelling reason or consideration worthy of this Court's review.

CONCLUSION

For the foregoing reasons, Respondents — Ticona Polymers, Inc., Shell Chemical LP and Underwriters Laboratories Inc. — respectfully request that this Court deny Brookshire's Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JANUARY 23, 2009

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-31154

BROOKSHIRE BROTHERS HOLDING INC; BROOKSHIRE BROTHERS MANAGEMENT INC; BROOKSHIRE BROTHERS LTD

Plaintiffs-Appellees

v.

DAYCO PRODUCTS, INC; SHELL CHEMICAL LP; TICONA POLYMERS INC; MARK IV INDUSTRIES LTD; UNDERWRITERS LABORATORIES INC

Defendants-Appellants

Appeal from the United States District Court for the Western District of Louisiana, Lake Charles

Before HIGGINBOTHAM, BENAVIDES, and STEWART, Circuit Judges. PER CURIAM:

On January 6, 2009, this court found that the federal district court abused its discretion in remanding this case to Louisiana state court. After the opinion issued, the plaintiffs-appellees nonetheless requested that the state court rule on dispositive motions. The state court

has now indicated that it intends to rule on those motions at a hearing on January 26, 2009. The defendants-appellants have filed an emergency motion to enjoin the parties from proceeding in the state court and to have the panel issue the mandate instanter. We refuse to issue the mandate instanter because this would interfere with the right of the plaintiffs-appellees to have the en banc court consider their en banc request. However, we are convinced that the request for an injunction should be granted.

The plaintiffs-appellees contend that the issuance of an injunction is prohibited by the Anti-Injunction Act, 28 U.S.C. § 2283, which generally bars a federal court from granting an injunction to stay proceedings in state court. However, the requested injunctive relief in this case falls within one of the express exceptions to the general prohibition contained in the Anti-Injunction Act: a federal court may enjoin state court proceedings "where necessary in aid of its jurisdiction." *Id.* The plaintiffs-appellees argue that this exception does not apply in this case because of the Supreme Court's holding in *Kline v. Burke Construction Co.*, 260 U.S. 226, 230-31 (1922), that the maintenance of a state action in personam involving the same subject matter at issue in a concurrent federal action does not tend to impair or defeat the jurisdiction of the federal court. However, the underlying dispute in this case is not the subject of parallel state and federal actions, but of a single lawsuit which was brought in state court, removed to federal court, and later—erroneously—remanded to state court. Permitting the state court to rule on dispositive motions

in this suit, which, as our opinion made clear, is properly before the federal district court, would seriously interfere with the federal district court's consideration of the case and deprive the defendants-appellants of their right to proceed in a federal forum. *See Atl. Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 295 (1970) (stating that the "necessary in aid of its jurisdiction" exception implies "that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case").

Nor is it clear that the Anti-Injunction Act reaches the relief we today grant. Its operative bite is the same as an order staying enforcement of an order of a district court pending review of its validity. Moreover this equitable relief serves to avoid undue friction between the federal and state courts and mitigate the costs of proceedings that will be voided if the present ruling of this panel stands. And it is unlikely that it will be overturned. Fed. R. App. P. 8 is no bar given the want of time. While there have been proceedings in the state court they have not until recently turned to efforts that will be undone on the vacating of the order of remand.

The motion for injunction is GRANTED, and the request for immediate issuance of mandate DENIED.

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No. 08-1233

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IN THE

Supreme Court of the United States

BROOKSHIRE BROTHERS HOLDING, INC. ET AL,
PETITIONERS

v.

DAYCO PRODUCTS, INC. ET AL, RESPONDENTS

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

This Court's decision in *Carlsbad Technologies, Inc. v. HIF Bio, Inc.*, __ U.S. __, 129 S. Ct. 1862 (May 4, 2009) (No. 07-1437), makes clear the need for this Court to timely reconsider its holding in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345-46 (1976), and to restore the clear bar on appellate review of district court remand orders Congress intended with the plain terms of 28 U.S.C. § 1447(d). This case presents an appropriate vehicle for reconsidering *Thermtron*.

In addition, because this case was removed to federal court solely under 28 U.S.C. §§ 1334(b) and 1452(a), the court of appeals also lacked jurisdiction under Section 1452(b)'s prohibition of review of remand orders in removed bankruptcy-related cases based on "on any equitable ground." That question too warrants this Court's review, especially since Fifth Circuit law exports the confusion and disruption of *Thermtron*'s mistaken rationale into the bankruptcy context under Section 1452(b). *See* Part II.B, *infra*. At the very least, the Court should grant the petition, vacate the decision below, and remand to permit the court of appeals to consider its lack of jurisdiction under Section 1452(b).[1]

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[1] As respondents noted (Opp. 3 n.1), defendants Dayco and Mark IV have petitioned for bankruptcy since the filing of the petition for certiorari in this case. The remaining, non-bankruptcy defendants filed their brief in opposition without Dayco and Mark IV. *Id.* The bankruptcy filing of the non-responding defendants does not affect this Court's ability to act on the petition. *See* 3 *Collier on Bankruptcy* § 362.03[3][d] (15th ed. 2002) ("[A] suit against a codefendant is not automatically stayed by the debtor's bankruptcy filing."); *accord Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 544 (5th Cir.

I. THE COURT SHOULD GRANT REVIEW AND RECONSIDER ITS PRIOR DECISION IN *THERMTRON*

This Court in *Carlsbad Technologies* held that a district court's decision in a removed case to remand after declining to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c) does not constitute a remand for lack of subject matter jurisdiction under 28 U.S.C. § 1447(c), and therefore does not fall within the bar on appellate review under 28 U.S.C. § 1447(d). The Court made clear that its holding was compelled by the logic of its prior decision in *Thermtron*, 423 U.S. at 345-46. *See* 129 S. Ct. at 1865-66 & n.1.

The Court noted that, although the holding in *Thermtron* was inconsistent with the plain terms of Section 1447(d), it had no occasion in *Calrsbad Technologies* to "revisit . . . whether *Thermtron* was correctly decided," because "[n]either the brief for petitioner nor the brief for respondents explicitly asked the Court to do so . . ., and counsel for both parties clearly stated at oral argument that they were not asking for *Thermtron* to be overruled." *Id.* at 1866 n.*. The Court further noted that no party in any of its post-*Thermtron* cases has ever asked that *Thermtron* be reconsidered. *Id.* ("We also note that the parties in *Powerex*, *Quackenbush*, and *Things Remembered* did not ask for *Thermtron* to be overruled."). Similarly, Justice Scalia's concurring opinion in *Carlsbad Technologies* emphasized that "nei-

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1983). Nonetheless, in an abundance of caution, respondents are contemporaneously moving in the bankruptcy court to modify the automatic stay to expressly exempt the proceedings in this Court.

ther party [in *Carlsbad Technologies*] has asked us to reconsider *Thermtron*, and we thus have no occasion to revisit that decision here." *Id.* at 1868. Justice Scalia went on to explain that "*Thermtron* was questionable in its day and is ripe for reconsideration in the appropriate case." *Id.*; *see also id.* at 1869 (Breyer, J., concurring) (noting that decisions following *Thermtron* show "something is wrong" and suggesting that "experts in this area of the law reexamine the matter with an eye toward determining whether statutory revision is appropriate").

The time has come for this Court to overrule *Thermtron*. The text of 28 U.S.C. § 1447(d) is clear: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." By its terms, it applies to *all* remand orders, and it reflects Congress's considered judgment that appeals of remand orders waste judicial resources, needlessly delay the legal process, and exacerbate the interference with state judicial proceedings necessarily occasioned by removal. The sole exception to the appellate-review bar of Section 1447(d) is limited to certain civil rights cases removed under 28 U.S.C. § 1443, and is not implicated here. As then-Justice Rehnquist explained in his dissent in *Thermtron*, Section 1447(d) "means what it says." 423 U.S. at 354 (Rehnquist, J., dissenting). And "Congress' purpose in barring review of all remand orders has always been very clear—to prevent the additional delay which a removing party may achieve by seeking appellate reconsideration of an order of remand." *Id.*

The rationale of *Thermtron* has corrupted this area of the law and has resulted in "a hodgepodge of jurisdictional rules that have no evident basis even

in common sense." *Carlsbad Technologies*, 129 S. Ct. at 1868 (Scalia, J., concurring). Such confusion was predicted by then-Justice Rehnquist in *Thermtron* itself. *See* 423 U.S. at 356 (Rehnquist, J., dissenting) ("Nor is it any more than a naive hope to suppose, as the Court apparently does, that the effect of today's decision will be limited to the unique circumstances of this case."). Further delay in revisiting *Thermtron* will not bring any greater clarity, and will instead only cause more waste and disruption to litigants and courts. It is time to restore the clarity reflected in the plain terms of Section 1447(d), overrule *Thermtron*, and hold that Section 1447(d) bars appellate review of all district court remand orders.

The court of appeals' decision in this case relied squarely on this Court's rationale in *Thermtron* in holding that it has jurisdiction over the appeal of the remand order in this case. *See* Pet. App. 3a-5a. This case is therefore an appropriate one in which to reconsider *Thermtron*.

II. SECTION 1452(b) FURTHER SUPPORTS GRANTING THE PETITION

The court of appeals also lacked appellate jurisdiction to review the district court's remand order because this case was removed to federal court under 28 U.S.C. § 1452(a) solely because it was related to a bankruptcy proceeding. Section 1452(b) makes clear that the district court may remand such a case on "any equitable ground," and that any such remand order "is not reviewable by appeal or otherwise." 28 U.S.C. § 1452(b).

Respondents concede (Opp. 4) that this case was removed under Section 1452(a) solely because it was "related to" a bankruptcy proceeding under 28

U.S.C. § 1334(b). Their arguments that Section 1452(b) nonetheless does not bar appeal of the remand order are unpersuasive and do not obviate the need for this Court's review.

A. The Factors Relied Upon By The District Court Constitute "Equitable Ground[s]" Under Section 1452(b)

Respondents assert (Opp. 16) that the district court's reliance on the discretionary supplemental-jurisdiction factors of 28 U.S.C. § 1367(c) removes this case from the coverage of Section 1452(b) because the Section 1367(c) factors are not entirely identical to the equitable factors lower courts have identified in remanding cases under Section 1452(b). That argument is unavailing.

Respondents ignore entirely the factors courts have developed under Section 1452(b) that are similar to the factors identified in Section 1367(c). *See* Pet. 4 (identifying such "equitable" factors as "the extent to which state law issues predominate over bankruptcy issues"; "the difficulty or unsettled nature of the applicable state law"; "the jurisdictional basis, if any, other than [§ 1334"; and "the presence of a related proceeding commenced in state court") (citing *Landry v. Exxon Pipeline Co.*, 260 B.R. 769, 801-02 (M.D. La. 2001)). The actual factors the district relied on in this case, moreover, correlate closely to equitable factors courts have identified under Section 1452(b). *See* Pet. App. 16a (district court remand order noting the "complex issues of State law" presented by the underlying product liability claims; the lack of any federal claim or any connection to the bankruptcy proceedings; the fact that "the suit . . . contains only issues of State law"; and "the interest of comity" as grounds for remand).

Moreover, the relevant question is not the exact overlap of the factors, but whether the district court remanded "on any equitable ground." Here, the factors the district court actually relied upon are all properly characterized as "equitable ground[s]." Indeed, respondents do not contest that the factors relied upon by the district court are all permissible "equitable" factors on which district courts can remand a case under Section 1452(b).

As Justice Ginsburg explained in her concurring opinion in *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 132 (1995), Section 1452(b)'s reference to remands on "any equitable ground" are "capacious words" that are not limited to the traditional distinctions between law and equity, but instead include *all appropriate grounds*. Several courts of appeals have relied upon Justice Ginsburg's formulation to hold a broad range of grounds are "equitable" and therefore non-appealable under Section 1452. *See* Pet. 15-16 (collecting cases). Indeed, if the failure to timely remove is an equitable ground under Section 1452(b), as Justice Ginsburg concluded in *Things Remembered*, it necessarily follows that the discretionary factors under Section 1367(c) relied upon by the district court here are equitable grounds. Respondents do nothing to rebut this conclusion.[2]

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[2] Respondents emphasize (Opp. 15) that the district court did not mention Section 1452 in its remand order and instead expressly relied on Section 1367(c). But, again as explained by Justice Ginsburg in her concurring opinion in *Things Remembered*, "it 'make[s] little sense' to rest reviewability *vel non* on the tag the trial court elects to place on its ruling." 516 U.S. at 134, quoting *Sykes v. Texas Air Corp.* 834 F.2d 488, 492 (5th Cir. 1987). Accordingly, regardless of how the district court characterizes the basis for its remand order, appellate review is

B. Section 1452(b) Applies To All Remands Of Cases Removed Under Section 1452(a), Even If The Case Has Lost Its Relationship To Bankruptcy

Respondents, relying on the Fifth Circuit's decision in *Doddy v. Oxy USA, Inc.*, 101 F.3d 448 (5th Cir. 1996), argue that "where, as here, a case is removed under § 1452(a) and the bankruptcy-related claims are later dismissed, . . . 'the court's remand authority switches from that under § 1452 to that under § 1367.'" Opp. 17 (quoting *Doddy*, 101 F.3d at 455). That reading of Section 1452 makes no sense.

The relevant grant of federal court jurisdiction is contained in 28 U.S.C. § 1334. It grants district courts original but not exclusive jurisdiction over "*all civil proceedings* . . . arising in or *related to* cases under title 11." 28 U.S.C. § 1334(b) (emphasis added). Section 1452(a) permits a party to "remove *any claim or cause of action* . . . if [the] district court *has jurisdiction of such claim or cause of action* under section 1334." 28 U.S.C. § 1452(a) (emphasis added). Section 1452(b) then provides that "[t]he court to which *such claim or cause of action is removed* may remand *such claim or cause of action* on any equitable ground." 28 U.S.C. § 1452(b) (emphases added).

Under a plain reading of those provisions, *all* of the claims in this case were within the district court's jurisdiction under § 1334 at the time of removal, because they were part of a "*civil proceeding . . . related to*" TCI's bankruptcy case. *See Allied Signal Recovery Trust v. Allied Signal, Inc.*, 298 F.3d

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barred by Section 1452(b) whenever the district court remands a case removed under Section 1452(a) on any equitable ground.

263, 267 (3d Cir. 2002) (noting that even if district court had jurisdiction under 28 U.S.C. § 1331 or some other jurisdictional provision, it had jurisdiction over entire case under Section 1334(b), including "Title 11 claims" and "state law claims because they were related to a Title 11 claim"). Because all of the claims were removed under § 1452(a), they were all subject to remand under § 1452(b), even though post-removal events eliminated the remaining claims' relationship to the bankruptcy proceedings. That is true, moreover, even if the district courts would also have jurisdiction over those claims under the supplemental jurisdiction provisions of Section 1367 or under some other jurisdictional provision. Under the plain terms of § 1452, any claim removed under § 1452(a) may be remanded under § 1452(b) for "any equitable ground." That is precisely what happened here.

It makes no sense, and undermines Section 1334(b), to divide up claims removed to federal court under Section 1452(a) into "bankruptcy-related" claims and "supplemental jurisdiction" claims, each with different standards for remand and different jurisdictional rules for appeals. Under the reasoning of *Doddy*, non-bankruptcy related claims that are removed along with bankruptcy-related claims are governed by the supplemental jurisdiction statute, 28 U.S.C. § 1367. Even if a district court decided to remand the bankruptcy-related claims to state court "on any equitable ground" under Section 1452(b), Section 1367(c)'s discretionary factors would govern the district court's discretion to remand the supplemental claims, and its decision as to those claims would be subject to appeal under *Carlsbad Technologies*. *See Doddy*, 101 F.3d at 455.

That is a gross distortion of Congress's clear intent—reflected in the plain terms of Section 1452(b)—to grant district court's broad discretion to order remands, and to bar appellate review of such orders, in all cases removed from state court because of their relatedness to a bankruptcy proceeding. The confusion and disruption caused by this Court's *Thermtron* holding should not be permitted to infect the clear terms of Section 1452(b) in remands in bankruptcy-related cases. Yet, that is precisely what will happen under the Fifth Circuit's reasoning in *Doddy*.

That reasoning, moreover, conflicts with that of the Third Circuit's in *Allied Signal*, which rejected a similar argument that the presence of alternative jurisdictional grounds somehow limited the ability to remand cases under Section 1452(b). The Third Circuit held that "[b]ecause this is a bankruptcy case, the additional presence of concurrent § 1331 jurisdiction could not preclude our consideration of remand as it presents itself in a bankruptcy case. The need to avoid the time and expense of reviewing remands in bankruptcy cases is substantial." 298 F.3d at 267 n.4 (citing *Things Remembered*, 516 U.S. at 136 (Ginsburg, J., concurring)). Indeed, the language of Justice Ginsburg's concurring opinion in *Things Remembered* relied on by the Third Circuit is equally applicable here. "Congress . . . meant to enlarge, not rein in, federal trial court removal/remand authority for claims related to bankruptcy cases," and it "wanted bankruptcy forum remands to be 'unreviewable.'" 516 U.S. at 132 (Ginsburg, J., concurring, quoting H.R. Rep. No. 95-595, p. 51 (1977), U.S. Code Cong. & Adm. News 1978, pp. 5787, 6013.

Accordingly, the plain meaning of § 1452(b) confirms the lack of appellate jurisdiction, as does the reasoning of other courts of appeals. *See, e.g., Allied Signal*, 298 F.3d at 269 (holding that the remand of a bankruptcy-related case "based on state law concerns," while not meeting "the criteria for remand under § 1447(c) and for the non-reviewability provisions of § 1447(d)," nonetheless "falls under § 1452(b) . . . and is not reviewable").

C. The Court Should Grant Review, Or At A Minimum, Vacate And Remand To Permit The Court Of Appeals To Consider Section 1452(b)'s Bar On Its Jurisdiction

As petitioners explained in the petition (Pet. 19-20), they did not raise Section 1452(b)'s bar on appellate jurisdiction in the court of appeals, although they did assert it as an independent basis for remand before the district court. Because it is jurisdictional in nature, however, the argument is not waived. *Id.* Contrary to respondents' suggestion (Opp. 13-14 & n.5), the fact that the lack of jurisdiction relates to the court of appeals and not the district court does not alter the jurisdictional nature of the defect or otherwise make it waivable. Appellate courts, like all others, must assure themselves of their jurisdiction, and can raise jurisdictional questions *sua sponte*, whether or not raised below. *See, e.g., Roell v. Withrow*, 538 U.S. 580, 598 (2003) (because valid consent to permit magistrate judge order is prerequisite to appellate jurisdiction, courts of appeals may raise it *sua sponte*).

Moreover, respondents' reliance on *Doddy* undermines their argument that the failure to raise the argument below precludes this Court's review. If, as they assert, Fifth Circuit law is clear that Section

1452(b) remand authority somehow disappeared once the bankruptcy-relatedness of the claims ended, then it would have been futile to raise the argument below, and this Court is free to review the Fifth Circuit's settled law that conflicts with the plain terms of Sections 1334 and 1452, as well as the reasoning of the Third Circuit in *Allied Signal*.

If, however, the Fifth Circuit law is less than clear, as suggested by its failure to follow *Doddy* (*see* Pet. 18 n.7), then it would be appropriate for this Court to grant the petition, vacate the decision below, and remand the case either with instructions to dismiss the appeal under Section 1452(b) or to permit the court of appeals to consider its lack of jurisdiction under Section 1452(b) in the first instance.

In all events, the petition should be granted and the court of appeals' lack of jurisdiction under Section 1452(b) should be resolved. Such review is essential to vindicate Congress's manifest intent, embodied in § 1452(b), to permit removed bankruptcy-related cases to proceed as quickly as possible in State court once a district court orders remand "on any equitable ground."

CONCLUSION

For the reasons explained in the petition and above, the petition for a writ of certiorari should be granted. In the alternative, the case should be remanded with instructions to dismiss the appeal for lack of jurisdiction, or to permit the court of appeals in the first instance to consider its jurisdictional defect under 28 U.S.C. § 1452(b).

Respectfully submitted,

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